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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

CLAY ARTHUR PIERCE, HENRY CLAY Pierce, and Pierce Investment Company, appellants,
v.
THE UNITED STATES.
No. 173.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This case is here on appeal from a decree of the Circuit Court of Appeals for the Eighth Circuit affirming a decree entered by the District Court for the Eastern District of Missouri against the appellants for $14,000 and interest, in satisfaction of a previous judgment against the Waters Pierce Oil Company for violating the Elkins Act of February 19, 1903 (32 Stat. c. 708, p. 847).

THE FACTS.

On January 29, 1907, an indictment was returned against the Waters Pierce Oil Company in the District Court for the Western District of Louisiana, charging the company with a violation

of the Elkins Act. On March 20, 1914, a verdict of guilty was returned and the court entered a judgment in favor of the United States for $14,000 and costs. This judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit. Thereafter execution upon the said judgment was issued out of the District Court for the Western District of Louisiana, upon which execution the marshal made a nulla bona return. A subsequent execution issued to the marshal of the Eastern District of Missouri was returned nulla bona.

Pursuant to a judgment in favor of the United States the American Surety Company of New York paid the cost of the prosecution. The judgment against the Waters Pierce Oil Company for the amount of the fine has not been paid. In the meantime, on July 7, 1913, the Waters Pierce Oil Company sold all of its property and assets to the Pierce Oil Corporation for certain stock and cash consideration. Henry S. Priest and Clay Arthur Pierce were appointed agents and trustees of the Waters Pierce Oil Company to receive from the Pierce Oil Corporation the consideration aforesaid and did actually receive the same. At the time of the transfer, Henry Clay Pierce was the owner of 2,727 shares of the common stock of the Waters Pierce Oil Company. The Pierce Investment Company was the owner of 1,000 shares and Clay Arthur Pierce owned one share. Each of the

above parties received his pro rata share of cash and stock from the Pierce Oil Corporation. Their shares were in excess of the amount of the judgment in this case.

The Waters Peirce Oil Company had no assets out of which a judgment could be collected, as the transfer to the Pierce Oil Corporation embraced all of the company's assets, and left it without any means or power to meet the judgment due to the United States. The company ceased to do business and was no longer a going concern. The stipulation shows, however, that the Waters Pierce Oil Company is, and at all times herein mentioned, was, a corporation duly organized.

This suit was brought against the Waters Pierce Oil Company, Henry S. Priest, Clay Arthur Pierce, Henry Clay Pierce, and Pierce Investment Trust Company to pursue the assets of the Waters Pierce Oil Company and compel payment.

The District Court held that the judgment obtained by the United States in the Western District of Louisiana was a valid and subsisting judgment against the Waters Pierce Oil Company, and, as that corporation had divested itself of all its property and had no assets subject to execution, the amounts shown to have been received in the distribution of the assets of the company by the appellant were held to be subject to the payment of the judgment against the corporation. Decree was entered in favor of the United States and against the appellants in the sum of $14,000 with

interest (R. 30–34). This decree was affirmed by the Circuit Court of Appeals for the Eighth Circuit.

ASSIGNMENTS OF ERROR.

The appellants assignments of error are found on pages 73, 74, and 75, of the record.

BRIEF.

I.

The judgment obtained against the Waters Pierce Company was collectible by execution.

Upon conviction an attempt was made to collect the judgment by execution. Such a course is authorized by section 1041 of the Revised Statutes. *Wasserman* v. *United States et al.*, 161 Fed. 722. Section 1041 provides:

> In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: *Provided,* That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid.

Thus it will be seen that a judgment, even in a criminal case, may be enforced by execution.

II.

The judgment being in the nature of a judgment debt must be treated as a debt.

The judgment was merely a fine, no prison sentence being attached. Indeed, the Elkins Act under which the company was convicted imposes only a fine, it being specifically stated that no imprisonment can be imposed:

> Every person or corporation who shall offer, grant, or give or solicit, accept, or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished. (32 Stat. c. 708, p. 847.)

Therefore, for a violation the Government can only exact a fine. It has been uniformly held by this court that an action of debt will lie to recover penalties or forfeitures for violations of statutes. *Stockwell* v. *United States,* 13 Wall. 531; *United*

States v. *Claflin*, 97 U. S. 546; *Chaffee & Company* v. *United States*, 18 Wall. 516; *Adams* v. *Wood*, 2 Cranch 336; *United States* v. *Younger*, 92 Fed. 672. In these cases the penalties were considered debts due the United States, recoverable in civil actions. Hence, upon the date of the violation, or at least upon the date when the indictment was returned, there existed a liability of the Waters Pierce Oil Company to the United States, which was later merged into a judgment.

In this case, however, it is even more conclusively indicated that a debt was due to the United States. Pursuant to section 1041, above cited, an execution would issue to collect a judgment in a criminal case. In other words, the judgment indicates a debt due, collectible by civil action. Here an indictment was returned upon which a judgment was rendered in favor of the United States for a specified sum of money.

> It can not be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon a contract. It is immaterial in what manner the obligation was incurred or by what it is evidenced, if the sum owing is capable of being definitely ascertained. *Stockwell* v. *United States*, 13 Wall. 531, 542.

By the judgment in the present case the amount due has been *definitely ascertained* and the amount is a *sum certain.*

Section 1041, Revised Statutes, clearly places judgments in criminal cases in the same class with judgments in civil cases and authorizes a similar procedure for recovery. Judgments in both classes of cases are debts due the United States recoverable in civil actions. Section 1042, Revised Statutes, shows even more plainly that Congress intended to treat such judgments as debts. This section allows a poor convict, when sentenced to pay a fine, an exemption only after he has shown that he has no property amounting to more than $20, except such as is exempt from execution for *debt.*

Thus Congress treated judgments in criminal cases in the same manner as other debts. Property exempt from execution for debt is also exempt from execution for fines. The two above sections conclusively indicate that such judgments are judgment debts and may be recovered in the same manner as any other debts. The leading text writers appear also to have taken this view:

> Very generally in this country, by statutes or under common law, the fine is thus treated as a sort of judgment debt. *Bishop on Criminal Procedure,* 3d ed. (1880), section 1304.
>
> By a statute of the United States a fine or penalty imposed as a "judgment or sen-

> tence" against any person in criminal cases "shall be declared a judgment debt and may be collected on execution in the common form of law." Wharton's Criminal Procedure (10th ed.), section 1862.
>
> An executor or administrator is also liable upon all statutes and recognizances entered into by the deceased; and upon all the inferior debts of record of the deceased, as fines imposed by the justices at Westminster, or at assizes, or quarter sessions, or by commissioners of sewers, or of bankrupts, by stewards in leets, or the like. Williams on Executors, volume 3, page 240 (7th ed.).

In discussing section 1042, Revised Statutes, this court in *Fink* v. *O'Neil,* 106 U. S. 272, 284, said:

> Nothing can be more clear than this, as a recognition by Congress that in case of executions upon judgments in civil actions the United States are subject to the same exemptions as apply to private persons by the law of the State in which the property levied on is found; and that, by this provision in favor of poor convicts, it was intended, even in cases of sentences for fines for criminal offenses against the laws of the United States, that the execution against property for its collection should be subjected to the same exemption as in civil cases.

In the case of *United States* v. *Stacey,* 155 Fed. 510, in passing on claims of exemption of homesteads levied on under executions issued on causes

in which judgment or sentence was rendered imposing the payment of fines, the court held:

> The court also refers to section 5296, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3608), as sustaining this conclusion. Section 5296 is found under title "Remission of Fines." I think this section clearly indicates that Congress intended that a poor convict, in taking the oath prescribed in section 1042, should be discharged from all further liability under the sentence imposing the payment of a fine; in other words, that the fine is thereby remitted. Moreover, section 1041, Rev. St. U. S. (U. S. Comp. St. 1901, p. 724), provides that the judgment for the payment of a fine may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. If a judgment in a civil case may not be enforced by execution against the exempt property of the defendant, it follows that a judgment for the payment of a fine may not be enforced against such property. Whatever may have been the ruling of the Supreme Court of Alabama on the subject, the legislation of the Congress, as construed by the Supreme Court of the United States thereon, is the authority which is to control this court. In *Clark* v. *Allen* (D. C), 114 Fed. 374, it is held that the exemption of a homestead may be asserted against a fine due to the United States Government. See also, same case (D. C.), 117 Fed. 699.

In the case of *United States* v. *Dunne*, 173 Fed. 254, 257, 258, the question was raised whether a criminal cause abated by the death of the defendant. The judgment had been rendered in favor of the Government in the court below and was in the Circuit Court of Appeals on writ of error. The court held that the cause abated, but in that case the cause was still pending, and in the court below the defendant had not only been sentenced to pay a fine but had been sentenced to serve a prison term. It was on account of these circumstances that the court decided in favor of the defendant.

> In a criminal case, the death of the accused after judgment, and while the case is pending in the Appellate Court upon writ of error, operates to abate the cause.
> * * *
>
> The rule that a statutory penalty merged in the judgment becomes a debt, and may be recovered from the estate of the judgment debtor, does not apply in this case. The indictment was under section 1782 of the Revised Statutes (U. S. Comp. St. 1901, p. 1212), providing that every person offending against the statute should be deemed guilty of a misdemeanor, and should be imprisoned and fined. The verdict of the jury was guilty. The judgment imposed a punishment of a fine and imprisonment as provided by the statute. This judgment is before us, and is made the basis of the claim of the United States against the estate of

> the defendant. For the present purpose it is an indivisible judgment and wholly penal. It can not be separated into parts, and one part kept alive as an indemnity, while the other, as a penalty, perishes with the death of the defendant.

It will be noted that the court recognized the rule that a statutory penalty merged in the judgment becomes a debt. The rule was held inapplicable because the sentence included both fine and imprisonment, and such sentence was not divisible. Here the judgment was a fine—the only sentence which could be imposed. Besides, the point was that the action was still pending in the courts when the deceased died, and, therefore, abated.

III.

A suit in the nature of a creditors' bill was a proper course to pursue to collect the amount of the judgment against the Waters Pierce Oil Company from the appellants.

It has been shown that the judgment against the Waters Pierce Oil Company was a judgment *debt*. The attempt to collect the judgment as provided in section 1041, Revised Statutes, having failed, this suit was brought in equity. The company had sold all its assets, turning over to the appellants, who were stockholders, their shares of the selling price, leaving the company still in existence but insolvent. The appellants received cash and stock in excess of the amount of the dividends. The purpose of a creditors' bill is to provide a remedy or

method for the collection of a debt out of property which can not be reached by execution. In equity the assets or the proceeds from a sale of corporate property are regarded as a trust fund for the payment of the corporate debts. Where such fund has been distributed among the stockholders, leaving debts unpaid, the creditors may pursue the property into the hands of the stockholders and compel payment. *Curran* v. *State of Arkansas et al.*, 15 How. 304, 307.

In *Railway* v. *Howard*, 7 Wallace, 392, 409, this point was involved:

> Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosesoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser and the rule is well settled that stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debts of the corporation are paid.
>
> Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company and the division of the proceeds of the sale

among the stockholders will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors in that event may pursue the consideration of the sale in the hands of the respective stockholders and compel each one, to the extent of the fund, to contribute pro rata towards the payment of their debts out of the moneys so received and in their hands.

Valid contracts made by a corporation survive even its dissolution by voluntary surrender or sale of its corporate franchises, and the creditors of the corporation, notwithstanding such surrender or sale, may still enforce their claims against the property of the corporation as if no such surrender or sale had taken place. Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are assets of the corporation, and as such constitute a fund for the payment of its debts, and if held by the corporation itself and so invested as to be subject to legal process, the fund may be levied on by such process, but if the fund has been distributed among the stockholders or passed into the hands of other than bona fide creditors or purchasers, leaving any debts of the corporation unpaid, the established rule in equity is that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of their debts.

Regarded as the trustee of the corporate fund, the corporation is bound to administer the same in good faith for the benefit of creditors and stockholders and all others interested in its pecuniary affairs, and anyone receiving any portion of the fund by voluntary transfer or without consideration may be compelled to account to those for whose use the fund is held. Creditors are preferred to stockholders on account of the peculiar trust in their favor and because the latter, as constituent members of the corporate body, are regarded as sustaining, in that aspect, the same relation to the former as that sustained by the corporation.

It is not essential to show fraud in the transfer or sale.

It is argued that this is true only when there is fraud in the decree, the appellants insisting that in all other cases a judicial sale operates to pass a title which cuts off all claims of unsecured creditors against the property. They rely on *Wenger* v. *Chicago, &c., R. R.*, 114 Fed. Rep. 34; *Farmers' Loan & Trust Co.* v. *Louisville, &c., Ry. Co.*, 103 Fed. Rep. 110; *Pennsylvania Transportation Co.'s Appeal*, 101 Pa. St. 576; *Kurtz* v. *R. R.*, 187 Pa. St. 59; *Paton* v. *N. P. R. R.*, 85 Fed. Rep. 838; *Shoemaker* v. *Katz*, 74 Wisconsin, 374; *Bame* v. *Drew*, 4 Denio, 287; *Ferguson* v. *Ann Arbor R. R.*, 17 App. Div. 336; *McArdell* v. *Olcott*, 104 App. Div. 263; S. C., 189 N. Y. 368, 384; *Candee* v. *Lord*, 2 N. Y. 269. Some of these cases

> hold directly, and others inferentially, that, in the absence of fraud, as here, a judicial sale is binding upon nonassenting creditors even though the decree was entered and the sale was made in pursuance of a contract, to which the stockholders were parties, and by which they were to retain a stock interest in the purchasing company. This makes the creditor's legal right against the shareholders' interest depend upon the motive with which they act and the method by which they carry out the scheme. If they do so by means of a private contract, though in ignorance of the existence of the creditor, the property remains liable for his debts. If they do so by means of a judicial sale under a consent decree and in like ignorance or disregard of his existence, the result is said to be different, although the shareholders should reserve exactly the same interest and deprive the creditor of exactly the same right. *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482, 502, 503.

Though it is believed that there is no doubt that a judgment in a criminal case is a debt and that, in this case, it is a debt due the United States from the Waters Pierce Oil Company, in fact, in a legal sense, as much a debt as is one based on a contract or judgment in a civil case, yet a contrary view would not destroy the Government's right in equity.

Section 1041, Revised Statutes, places judgments in criminal cases within the same class as judgments in civil cases, and section 1042, Re-

vised Statutes, strengthens this view. There is no contention that a judgment in a civil case is not recoverable in equity. Section 1041 has provided a method of collecting judgments by the United States by authorizing the issuance of an execution. If the execution is futile, a nulla bona return being made, must the Government drop the matter and lose the money due? Is it not more reasonable to presume that the word "execution" as used in section 1041, Revised Statutes, signifies the processes and proceedings used in enforcing judgments in civil cases? Congress could not have intended to allow a fine to go unpaid merely because the property had been so placed that it could only be reached in equity.

It has been held by this court that the essential facts to be shown to acquire jurisdiction in equity in connection with the creditor's bill are a judgment, and the issuance of an execution upon which a nulla bona return has been made. When such facts have been shown a creditor's bill is in reality merely a further step or aid to the execution in the enforcement of the judgment. *Davies v. Corbin,* 112 U. S. 36, 40.

> In the first case the court, when its aid is invoked, looks only to the execution, and the return of the officer to whom the execution was directed. The execution shows that the remedy afforded at law has been pursued, and of course, is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and from the

> embarrassments which would attend any other rule, the return is held conclusive. The court will not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy. If the return be false, the law furnishes to the injured party ample remedy.
>
> In the second case the equitable relief sought rests upon the fact that the execution has issued and a specific lien has been acquired upon the property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation. It is to remove the obstruction, and thus enable the creditor to obtain a full price for the property, that the suit is brought. (*Jones* v. *Green et al.*, 1 Wall. 330, 332.)

It is therefore insisted that the judgment was a debt due the United States, and secondly, that the word "execution," being broad enough to include proceedings necessary to enforce the judgment, regardless of whether or not the judgment is for all purposes a debt, a creditor's bill will lie to recover the same.

IV.

The contention that even if the judgment is a debt it became a debt or judgment debt after the reorganization of the Waters Pierce Oil Company, and hence as a subsequent creditor the United States has no rights in the premises is unsound.

This contention can not prevail for it has clearly been shown that the violation of the act resulted in a liability to the United States from

the company. This liability as has been previously shown, accrued several years prior to the reorganization. It can, at least, be said that, upon the return of the indictment in 1907, the United States had a claim against the corporation to which its assets were subject. Otherwise, a corporation and its stockholders may evade a penalty regardless of the amount even if the trial is almost completed and a verdict against it practically assured, by distributing its assets to the stockholders during the pendency of the trial. It is true in this case that, at the time the assets were distributed, the judgment had not been rendered and the claim was not, therefore, liquidated, but it was a claim that the corporation and stockholders knew would be liquidated. However, it is immaterial that a judgment had not been rendered. The right of action had accrued upon which a prosecution was pending. The case of *Northern Pacific Railway* v. *Boyd,* 228 U. S. 482, is practically analogous to the present case. There the claim was unliquidated at the time the corporation became insolvent, by selling and distributing all its assets. The claim, although liquidated and a specified amount, *ascertained subsequent to the sale,* was held to be valid and a judgment was rendered in equity against the Northern Pacific Railway, which had bought stock from the insolvent corporation. In the case of *Baltimore and Ohio Telegraph Company* v. *Interstate Telegraph Company,* 54 Fed. 50, a creditors bill was

brought against the Baltimore and Ohio Railroad and the Baltimore and Ohio Telegraph Company, by the Interstate Telegraph Company to recover a judgment rendered subsequent to the insolvency of the Baltimore and Ohio Telegraph Company. A decree in favor of the Interstate Telegraph Company was affirmed.

> A railroad company, owning an extensive telegraph system, caused the incorporation of a telegraph company by its officials, furnished its entire capital stock, and in the name of such telegraph company contracted with complainant. For breach of such contract, complainant recovered judgment against the telegraph company. The railroad company sold the entire telegraph plant, received all the consideration, and left the telegraph company insolvent, and without assets of any kind. *Held*, that the money realized by the railroad company from such sale was in its hands a trust fund properly applicable to the payment of such judgment, and that payment thereof would be enforced by a court of equity. 51 Fed. Rep. 49, affirmed. (From the syllabus.)

The court recognized the Interstate Telegraph Company's right to bring a suit on the law side of the court to obtain a judgment against the Baltimore and Ohio Telegraph Company, an insolvent corporation.

> After this conveyance and transfer the Baltimore & Ohio Telegraph Company of Baltimore County could not any longer

> perform its covenants with the Interstate Telegraph Company, having been denuded of its property and plant thereby. Thereupon the latter company brought its suit on the law side of the Circuit Court for the District of Maryland and recovered judgment against the Baltimore & Ohio Telegraph Company in the sum of $25,000. Execution was issued on this judgment, and returned nulla bona. Upon this the Interstate Telegraph Company instituted proceedings on the equity side of the same court against the Baltimore & Ohio Railroad Company and the Baltimore & Ohio Telegraph Company of Baltimore County, seeking the payment of this judgment. (Id., 53.)

In the above case the Baltimore and Ohio Railroad practically owned the Baltimore and Ohio Telegraph Company and sold all the assets of the latter corporation to the Western Union Telegraph Company. The proceeds of this sale were held to be a trust fund out of which a court of equity would enforce the payment of the judgment for $25,000. The case of *Swan Land and Cattle Company* v. *Frank*, 148 U. S. 603, cited in the opinion of the court below as conclusive, is directly in point. In this case a suit in equity was brought against several stockholders of three corporations which, though in existence, had distributed their corporate funds among their stockholders. The suit sought to collect unliquidated

damages. The bill was ordered dismissed because plaintiff's claim had not been reduced to judgment and the debtor corporations had not been made parties. In other words, it appears that even if the several corporations had no assets, a judgment should have been obtained against them and execution issued before a creditor's bill would lie. Neither of the reasons which stood in the way of relief in this case is present in the case at bar. Here the plaintiff has a judgment on which execution has been returned unsatisfied, and the Waters Pierce Oil Company, the judgment debtor, is a party defendant.

> A party having a claim for unliquidated damages against a corporation which has not been dissolved, but has merely distributed its corporate funds amongst its stockholders and ceased or suspended business, can not maintain a suit on the equity side of the United States Circuit Court against a portion of such stockholders, to reach and subject the assets so received by them to the payment and satisfaction of his claim, without first reducing such claim to judgment, and without making the corporation a defendant and bringing it before the court.
>
> Corporations are indispensable parties to a bill which affects corporate rights and liabilities. *Swan Land & Cattle Company* v. *Frank*, 148 U. S. 603. (From the syllabus.)

Discussing the trust fund theory on page 609, the court said:

> The theory of the bill is that the assets of the vendor corporations which have been distributed to and received by the defendants as stockholders constitute a trust fund for the payment of all debts and demands against the companies and may therefore be followed in the hands of, and recovered from, such stockholders to the extent necessary to discharge valid claims against the corporations from which they were received. The funds sought to be reached are undoubtedly applicable, under proper proceedings against all necessary parties, to the payment, so far as may be needed, of outstanding indebtedness against the corporations which distributed the same; but the difficulty here is that the complainant has not adopted the requisite and necessary procedure to subject said funds thereto. It has no judgment against the corporations by which it was defrauded, nor are such corporations made parties defendant to the suit or brought before the court. The stockholder defendants who have been served with process and entered their appearance do not undertake to represent, and can not in any way represent, the corporations against whom the claim for damages is asserted. *Bronson* v. *La Crosse & Milwaukee Railroad*, 2 Wall. 283, 301, 302.

Even where the trust fund theory is not involved this court has recognized the rights of creditors

whose claims may supervene in the future. In the case of *Smith et al.* v. *Vodges*, 92 U. S. 183, an individual made a settlement of some property upon his wife. The court held:

> The law of this case is too well settled to admit of doubt. In order to defeat a settlement made by a husband upon his wife it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene; the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable. *Sexton* v. *Wheaton*, 8 Wheat. 229; *Mullen* v. *Wilson*, 8 Wright, 413; *Stileman* v. *Ashdown*, 2 Atk. 481.

V.

There is a proper joinder of parties and causes of action in the bill of complaint.

Rule 26 of the new equity rules is applicable to this case for that rule was promulgated prior to the commencement of this suit. *Miller Rubber Company* v. *Behrend et al.*, 242 Fed. 515, 517. This rule broadens the power of a plaintiff to join in one bill many causes of action. The rule provides:

> The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when

> there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action can not be conveniently disposed of together, the court may order separate trials.

Under the above rule the plaintiff may join as many causes of action cognizable in equity as he may have against the defendant. Where there are more than one defendant the liability must be asserted against all of the material defendants or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. Under this rule it can not possibly be said that the bill of complaint in this case is multifarious. In this case the liabilitiy is asserted against every one of the defendants. There is really only one cause of action set forth in the bill. Plaintiff asked for an accounting from all of the defendants of the stock and money received by them in liquidation of the Waters Pierce Oil Company and for a decree against them for the amount of its judgment. This rule has been construed several times by a Federal court and the courts appear to have recognized that the rights of plaintiffs to join different

causes of action and to assert them against several defendants have been greatly broadened. In the case of *Miller Rubber Company* v. *Behrend*, 242 Fed. 515, 517, the court after citing rule 26, held that, "Under this rule, provided the diversity of citizenship exists, and it does exist in this case, we see no reason why the plaintiff was not entitled to join in one bill its cause of action on the patent and its cause of action for unfair competition." And again in *Elder* v. *Western Mining Company*, 257 Fed. 970, 977, it was said:

> No complaint is multifarious which presents a common point of litigation, the decision of which will affect the whole subject matter and will settle the rights of all the parties to the suit, and it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient that each party has an interest in some material matters involved therein and they are connected with the others.

It was also held that under this rule a bill for the foreclosure of two mortgages was not multifarious. *Crawford* v. *Washington Northern Railroad Company*, 233 Fed. 962.

Even applying the practice followed prior to the promulgation of rule 26, this bill of complaint could not be called multifarious. It contains all requisites essential to a joinder of parties and causes of action as set forth in several Federal

decisions. In *Bitterman* v. *Louisville & Nashville R. R.*, 207 U. S. 205, 226, it was said:

> The proposition that the bill was multifarious because of the misjoinder of parties and causes of action was not assigned as error in the Circuit Court of Appeals, and, therefore, might well be held not to be open. But passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions. Under these conditions the case is brought within the principle laid down in *Hale* v. *Allinson*, 188 U. S. 56, 77.

The following authorities also hold the like view:

Brown v. *Guarantee Trust & Safe Deposit Co.*, 128 U. S. 403;

Rogers v. *Penobscot Mining Co.*, 154 Fed. 606;

Fowler v. *Palmer, et al.*, 160 Fed. 1;

M'Mullen Lumber Co. v. *Strother*, 136 Fed. 295;

South Penn Oil Co. v. *Calf Creek Co.*, (C. C.) 140 Fed. 507–516;

Weir v. *Bay State Gas Co.*, 91 Fed 940;

Simpkins Federal Equity Suit, page 290; and

Jones Manual Equity Pleading & Practice, page 49.

It is entirely unnecessary to join all the stockholders as party defendants. *Hatch* v. *Dana*, 101 U. S. 205.

VI.

The Government's suit against the Pierce Oil Company in the Western District of Louisiana was no election of remedies barring the United States from bringing the present suit.

It is contended that the Government, by filing suit against the Pierce Oil Company, made an election of remedies and was thereby estopped from bringing the present suit. The suit was brought to collect the judgment out of the property sold by the Waters Pierce Oil Company to the Pierce Oil Company. The cause of action was based on the trust fund theory. Thus it will be seen that the two suits are similar. Both were actions brought in equity to collect a judgment out of the assets of the insolvent corporation. They were suits of the same nature brought for similar purposes. There is no inconsistency. It is sought in each case to collect a judgment against the insolvent corporation. It would be indeed strange if a creditor could not pursue the property of his debtor at the same time in the hands of different parties. The test of the applicability of the doctrine of election of remedies is whether or not the suits are inconsistent.

> Where the remedies afforded are inconsistent it is the election of one of such remedies which operates as a bar; but where the

remedies afforded are consistent it is the satisfaction of the claim which operates as a bar. (20 Corpus Juris, 8.)

The fact that a trustee in bankruptcy obtained a money judgment against one to whom the bankrupt transferred certain assets to delay and defraud creditors, held, in this case, not to have amounted to ratification of the bankrupt's act or to an election not to pursue the assets transferred, but the bankrupt was entitled to also maintain a bill in equity to set aside the transfer. (*Thomas* v. *Sugarman,* 218 U. S. 129; from the syllabus.

The doctrine of election is applicable as between inconsistent remedies; but does not apply to a partner wrongfully excluded from participation. He does not lose his right to an accounting because he first starts an action at law which he subsequently dismisses. (*Zimmerman* v. *Harding,* 227 U. S. 489; from the syllabus.)

And again, on page 493, it is said:

> But we think the doctrine of the election of remedies has no proper application here. The essential element of that rule is that there must have been a right of choice between two remedies which are inconsistent with each other. *Bierce* v. *Hutchins,* 205 U. S. 340.

In *Westervelt* v. *Mohrenstecher,* 76 Fed. 118, 124, it was held that, in an action on a cashier's bond for damages arising from breach thereof by his misappropriation of money and making of exces-

sive loans, the fact that the bank and its receiver have sued and obtained judgment upon notes taken by the cashier for such misappropriated money and excessive loans is no defense.

> The fact that the bank or its receiver has sued and obtained judgments upon the promissory notes which this cashier took for misappropriated money of the bank and for excess loans is no defense to this action. This is not an action to rescind any contract and recover back the consideration thereof. It is an action for damages for breach of the conditions of this bond. The obligation of the bond is to pay any loss or damage which the bank sustained by the failure of this cashier to faithfully fulfill and perform the trust reposed in him and to comply with the other conditions expressed therein. Neither the bank nor the receiver is required to repudiate his transactions or restore the consideration it has received from them, in order to maintain this action. There is no inconsistency between an action upon the notes he wrongfully took and a recovery of all that the makers can pay upon judgments thereon, and an action upon this bond for the losses sustained by the breach of its conditions. The bank and the receiver may take every benefit they can derive from the acts of this cashier, use every just endeavor to collect every note he has obtained in the name of the bank, and at the same time may press this action on the bond for the damages

> caused by the breach of its conditions. Of course, the bank and the receiver can have but one payment and satisfaction of the debts owing upon the notes the cashier took, and when they are paid in full that payment will constitute a defense to this action, but until then both remedies may be pursued. *Vulcanite Co.* v. *Caduc,* 144 Mass. 85, 10 N. E. 483; *Bank* v. *Birch,* 130 N. Y. 221, 29 N. E. 127; *Emery* v. *Baltz,* 94 N. Y. 408; *White* v. *Smith,* 33 Pa. St. 186.

Furthermore, it has been held that even if two remedies are inconsistent, a party may pursue both until he recovers through one.

> It is specified as error that the court refused to hold that the receiver was barred from maintaining this action on the bond because he had brought an action against the Masonic Home on the note for $3,000 made by Tygard in its name, and for money had and received by the home, and because it had good causes of action against the home therefor. But there was no error in this ruling, although the action on the note, which necessarily asserted the authority of Tygard to make it, was inconsistent with the theory of the action on the bond, which is that he had no such authority. Where a wrong has been perpetrated and the victim is doubtful which of two inconsistent remedies is the right one, he may pursue both until he recovers through one, and in the absence of facts creating an equitable estoppel, his prosecution of the wrong rem-

> edy to a judgment of defeat will not estop him from subsequently pursuing the right one to victory. * * * The contract of the defendants was to indemnify the bank against any loss it might sustain from the failure of their principal to discharge faithfully the duties of his office, and until those losses are repaid it is no defense for them that the bank, or its receiver, has or pursues other remedies to relieve from them. *Rankin* v. *Tygard et al.*, 198 Fed. 795, 806.

In the Louisiana case no action had been taken except that the bill and answer were filed (Rec., pp. 37, 46). The position of the appellants has not in any way been altered or prejudiced by such preliminary steps. This fact has heretofore been considered important.

> The law is not such an exact science that rights and remedies are clear at all times, and it does not tend to justice to hold one strictly to a bare election between them where nothing has been gained and no one prejudiced. We think the claimant is entitled to the proceeds of the articles embraced in its contracts not exceeding, however, the amount the bankrupt was to pay, with interest. *Nauman Co.* v. *Bradshaw*, 193 Fed. 350, 354.

In *Slaughter et al.* v. *La Compagnie Francaises Des Cables Telegraphiques*, it was said that—

> The beginning, therefore, of an action at law for damages, or of a suit in equity for specific performance, does not operate as a

decisive act, which determines the rights of the parties once for all. But if the plaintiff institute separate actions, he can not carry both to judgment and satisfaction, and may be compelled by order of the court, at any stage of the proceedings, to elect which he will further prosecute. *Rogers* v. *Vosburgh,* 4 Johns. Ch. 84; *Livingston* v. *Kane,* 3 Johns. Ch. 224. In *Fox* v. *Scard,* 33 Beav. 327, defendant had contracted not to carry on the business of surgeon at a particular place for a certain period of time, and had executed a bond in the penal sum of £1,000, conditioned to the same effect. It was held that a recovery of damages at law would bar his prosecution of a suit in equity for an injunction. To the same effect is *Sainter* v. *Ferguson,* 1 Macn. & G. 286. Defendant here relies on a dictum in *Fox* v. *Scard* referring to former practice in equity, where the legal right was in doubt, under which the court used to direct an action to try the right. If plaintiff merely established his right, and took nominal damages, he obtained equitable relief; but, if he sought and obtained substantial damages, the court, when he came back, dismissed his bill, saying, "You have already had your remedy at law." But the case at bar is not parallel. Plaintiff has not been directed or allowed by a court of equity to try the single issue of legal right in a court of law. In his action at law he sought for damages—actual not nominal damages. Modern practice does not allow a party to bring an action

> at law, not for damages, but to establish some single issues in the controversy, such as validity of contract, breach of it, or what not, and then, having determined those issues in one action, to bring a second action for the relief appropriate to the facts found in the first one. If he sues at law for a breach, he is entitled to recover the damages he has sustained by such breach; and recovering them, whether their amount be large or small, bars him from insisting thereafter in equity that defendant perform the contract. If, as the trial of the action at law progresses, plaintiff discovers that the evidence is not likely to secure him sufficient damages, he should apply to withdraw a juror, so as to leave himself free to apply thereafter for equitable relief. In the cause at bar he was warned by the ruling of the trial judge, before it was sent to the jury, that he could not expect substantial damages. When after that he persisted in going on to verdict and judgment, he made an election which he can not now repudiate. *Slaughter et al.* v. *La Compagnie Francaises Des Cables Telegraphiques,* 119 Fed. 588, 589.

And again in *Brady* v. *Daly,* 175 U. S. 148, 160, it was held that—

> The plaintiff in error further claimed that the plaintiff below, by first proceeding in equity for an injunction, and incidentally for an accounting of profits, made an election to recover profits, which effectually

barred him from a recovery of damages under the statute.

The equity action was brought to enjoin the defendant from performing the play of "After Dark" with the railroad scene in it, taken from the plaintiff's play "Under the Gas Light," and the injunction was asked for on the ground that plaintiff's injuries could not be accurately ascertained or computed, and compensation for such injury could not be made by damages, and as a portion of the relief complainant asked that the defendant be decreed to render a full and true account of all money and profits received by him. The decree in that case, however, did not direct the master to ascertain anything in regard to profits, no evidence was offered upon that subject, no finding was made thereon, and upon the coming in of the master's report no final judgment or decree for profits was ever asked or rendered.

In view of these facts, we think there was no election of an inconsistent remedy by the plaintiff in the action which would bar him from the maintenance of this action for the recovery of damages under the section of the Revised Statutes before referred to. *Brady* v. *Daly*, 175 U. S. 148, 160.

VII.

There was no necessity of bringing suit in Missouri.

Appellants contend that this suit in equity will not lie in Missouri for the reason that a judgment at law had not been rendered in that State. It

is true that no judgment had been obtained, but that is entirely unnecessary. The Government exhausted all of its legal remedies against the Waters Pierce Oil Company. Execution was issued on the judgment in Louisiana and returned nulla bona, and execution was likewise sued out of the United States District Court for the Western District of Louisiana, directed to the marshal of the Eastern District of Missouri, and a nulla bona return was also made on that execution. This procedure is authorized by section 986 of the Revised Statutes. That section provides:

> All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one State may run and be executed in any other State or in any Territory, but shall be issued from, and made returnable to, the court wherein the judgment was obtained.

Thus it will be seen that judgments obtained for the use of the United States may run and be executed in any court of Federal jurisdiction in any part of the Union. It is, of course, true that an execution on a judgment where mere individuals are involved can be executed only in the State where the judgment was obtained, but it appears that the above section makes judgments obtained for the use of the United States an exception to this general rule. In *Toland* v. *Sprague,* 12 Peters 300, 328, the court has distinguished be-

tween executions on judgments for the use of the United States and those for the use of individuals.

> In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons, in another district of the same State; and the other, in favor of the United States, in any part of the United States.

It is also contended by the appellant that section 986 does not apply to executions upon judgments in penal cases imposing a fine. This contention can not prevail. It has already been shown that "In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced." So it will be seen that judgments in favor of the United States are treated alike whether criminal or civil and execution will issue *for the use of the United States.* Section 986, Revised Statutes, applies to all executions upon judgments *obtained for the use of the United States.* It must include judgments in criminal cases. The word judgments in section 986, read in connection with section 1041, is used in a broad

sense—including judgments or sentences in criminal cases. In *State* v. *Lynch*, 28 Rhode Island, 463, 404, the question was raised as to whether the word judgment in a statute was broad enough to include a sentence in a criminal prosecution. The court held:

> It is urged on behalf of the State that section 473 is not applicable to criminal cases. This contention is principally founded on the fact that the section does not use the word "sentence," or any equivalent expression which would specially designate the judgment in a criminal case, as is done in sections 487, 490, and 491, where both words "judgment" and "sentence" are used. We do not regard the omission of the word "sentence," in the section under consideration, as conclusive, since, in the corresponding provision, chapter 251, section 3, Gen. Laws, 1896, for which section 473, Court and Practice Act was substituted, makes the same omission. That section in terms affords its remedy in the case of "indictments or other criminal prosecutions in which verdict or judgment shall have been rendered against the petitioner." The word "judgment" was clearly used here in its broad sense, which includes a sentence as well as the final decision of the court in a civil case. It seems probable that the commissioners drafting the present law adopted the language of the section they were revising, and considered the word "judgment" as ample to comprehend both

> classes of proceedings. The present law is as necessary in criminal proceedings as in civil cases. We see no reason why a person who has been convicted of crime should not have, within a reasonable time after sentence, an opportunity to correct the effects of any mistake or accident which may have prevented him from prosecuting a bill of exceptions in due time, or to avail himself of newly discovered evidence after the time has elapsed within which he could have presented it as a ground for new trial to the superior court, while such a privilege is given to the unsuccessful party to a civil suit.

The contention is also made that this suit is premature, because even if section 986, Revised Statutes, applies, the bill of complaint does not aver that an execution was issued to the marshal of the Eastern District of Missouri. The amended bill states that an execution upon a judgment was issued out of the United States District Court for the Western District of Louisiana directed to the United States Marshal for the Eastern District of Missouri and that a nulla bona return on said execution was made. This procedure is authorized by rule 34 of the new equity rules.

> Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was igno-

rant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit, determining the matters in controversy or a part thereof.

VIII.

The question as to whether interest upon the judgment was properly awarded, not having been raised in the court below, will not be passed on here.

The district judge entered a decree in favor of the United States with interest. Upon appeal to the Circuit Court of Appeals the appellants did not include the question of interest in their assignments of error. It is not shown anywhere in the record nor in the briefs that the question was raised in either the trial or appellate courts, except in a petition to rehear filed in the latter court. Upon affirmance of the decree of the District Court the appellants were denied a rehearing. Then this appeal was perfected and the question of interest was assigned as error, though it had not been one of the errors assigned in the Court of Appeals.

It has been consistently held by this court that no issue not raised in the lower court will be passed on here, and that the assignments of error can not enlarge or add to the issues passed on by the lower court. *Waters Pierce Oil Co.* v. *Texas*, 212 U. S. 112; *Mallers* v. *Commercial Loan & Trust Co.*, 216 U. S. 613; *Cleveland, etc., Ry. Co.*

v. *Cleveland,* 235 U. S. 50; *Keokuk and Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626.

The above authorities involve cases appealed from State courts. In the case of *Virtue* v. *Creamery Package Co.,* 227 U. S. 8, 38, in a case brought upon error from the Circuit Court of Appeals, it was held that—

> But plaintiffs urge that the Creamery Package Manufacturing Company was of itself a combination offensive to the statute and that they were entitled to go to the jury as to that company. But the contention was not made in the Circuit Court nor was it made in the Circuit Court of Appeals. * * * It is manifest, therefore, that the separate liability of the Creamery Package Manufacturing Company is an afterthought and urged in this court for the first time (pp. 38–39).

In the case of *Lloyd* v. *Preston,* 146 U. S. 630, 645, the question of interest was raised for the first time in the Supreme Court and it was held that—

> Error is likewise assigned to the allowance of interest on the judgments after the date of Harper's assignment. It is claimed that, as against the estate in the hands of the assignee, interest ceased from the date of the assignment.
>
> There is nothing before us to show that there are not funds in the hands of the assignee sufficient to pay Harper's debts in full, with interest to the date of payment,

> and as it does not appear that this matter was brought to the attention of the court below, when framing the decree, or at any time, we do not feel disposed to disturb the decree.

The petition for a rehearing included in its contentions the matter of interest. The Circuit Court of Appeals denied the petition, with the brief statement that—

> It is urged that the trial court erred in the matter of interest included in the judgment under review. As this question was not raised by the assignments of error and briefs at the hearing we do not think it should be considered now. The other matters in the petition for rehearing were fully considered and we see no reason for changing the conclusion.
>
> The petition is denied. (R. 72.)

The fact that the question was included in the petition for a rehearing can not be said to have raised the bar caused by failure to assign it as error and thereby give appellants the privilege of including it here in the assignments of error. The granting or denying of a petition to rehear is discretionary with the court, upon which an appeal will not lie. *Brown* v. *Clarke,* 4 How. 3, 15; *Roemer* v. *Bernheim,* 132 U. S. 103, 106.

In the latter case it was said:

> The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of

> the court in which the case has been heard or tried, and is not a subject of appeal (p. 106).

The Supreme Court will not consider questions raised for the first time in a petition to the court below for a rehearing. Such questions are not a part of the record.

> But as a petition for rehearing forms no part of the record, it can not be noticed. The jurisdiction of the court depends on the matters disclosed in the bill of exceptions. *Lagrange* v. *Chouteau,* 4 Pet. 287, 288.

In *Giles* v. *Heysinger,* 150 U. S. 627, 630, the same view is upheld—

> Acting upon this theory, the court directed an interlocutory decree for the plaintiffs. Defendants thereupon moved immediately for an order to reopen the case for the admission of additional testimony bearing upon the question of anticipation, and for a rehearing; and presented seven affidavitis in support of Blakesley's testimony concerning the manufacture of crimpers by passing a bare strip of metal through the dextrine before the silk braid was applied; and also the affidavit of his counsel, explaining the omission of the mention of this particular in the affidavits of Wright and Blakesley, read in opposition to the motion for a preliminary injunction. The court denied a rehearing, and the case was referred to a master, who proceeded to

take testimony in respect to the damages, and submitted a report, upon which a final decree was entered. Under these circumstances, we have not felt at liberty to consider the affidavits for a rehearing.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals be affirmed.

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JANUARY, 1921.

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